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No. 77-429

In the Supreme Court of the United States

OCTOBER TERM, 1977

LAWRENCE R. FRY and NELLIE R. FRY, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

WADE H. MCCREE, JR.,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

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The sole question presented by the petition is whether income derived by petitioners from logging operations is exempt from federal income taxation because petitioners are Indians. Petitioners are enrolled members of the Confederated Tribes of the Colville Reservation and residents of the Reservation. During 1962-1966, petitioner Lawrence R. Fry acted as a subcontractor to a non-Indian contractor performing logging operations on unalloted tribal land in the Reservation (Pet. App. A 11-12).

Petitioners paid $21,498.62 in income taxes, self-employment taxes and interest on the income derived from this logging operation. In this refund suit brought by petitioners in the United States District Court for the Eastern District of Washington, the district court rejected

petitioners' claim to immunity from tax and dismissed the suit (Pet. App. B 28-29). The court of appeals unanimously affirmed (Pet. App. A 11-26).

The court of appeals correctly held that the petitioners' income from their contract logging operation was not exempt from federal income tax under any treaty or statute. As this Court stated in *Squire* v. *Capoeman,* 351 U.S. 1, 6: "* * * Indians are citizens and * * * in ordinary affairs of life, not governed by treaties or remedial legislation, they are subject to the payment of income taxes as are other citizens."

Here, it is undisputed that petitioner derived the income in question from services performed as a subcontractor for a non-Indian contractor in logging operations on tribal land (Pet. 5-6). Whatever the status under applicable treaties and statutes of the profits derived by the tribe from the sale of standing timber on the tribal lands of its reservation (see *Squire* v. *Capoeman, supra,* 351 U.S. at 8-9; *Holt* v. *Commissioner,* 364 F. 2d 38 (C.A. 8), certiorari denied, 386 U.S. 931), petitioners' income was earned under a contract to perform services. *Squire* v. *Capoeman, supra,* 351 U.S. at 4-5, n. 7. Income received by an Indian for the performance of services is subject to federal income tax, even where the services were rendered as an officer of a self-governing Indian community. *Commissioner* v. *Walker,* 326 F. 2d 261 (C.A. 9).

Petitioners point to no statute, no treaty, and no case holding that income derived by an Indian from a contract to perform services is exempt from federal income tax. As the court of appeals observed (Pet. App. A 19-20), their argument appears to be based on an expansion of the doctrine that ambiguities in statutes and treaties dealing with the rights of Indians are to be resolved in favor of the Indians. *Stevens* v. *Commissioner,* 452 F. 2d 741, 744 (C.A. 9). See, *Northern Cheyenne Tribe* v. *Hollowbreast,* 425 U.S. 649, 655, n. 7. They would read that doctrine as extending a tax exemption to any activity carried out by an Indian even indirectly for the benefit of an Indian tribe or other individual Indians (Pet. App. A 19-20).

But exemptions are not to be granted by implication. Here, no treaty or statute provides a tax exemption for the contract income earned by petitioners. The court of appeals therefore correctly held that the income was subject to tax. *Superintendent* v. *Commissioner,* 295 U.S. 418, 420; *Commissioner* v. *Walker, supra,* 326 F. 2d at 263-264. See *Mescalero Apache Tribe* v. *Jones,* 411 U.S. 145.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

WADE H. MCCREE, JR.,
Solicitor General.

DECEMBER 1977.

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